

WISCONSIN SUPREME COURT CALENDAR

October 3, 2000

9:30 a.m.

99-1767-FT In the Interest of Douglas D.: State v. Douglas D.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a ruling from Oconto County Circuit Court, Judge Richard DelForge presiding.

In this case, the Wisconsin Supreme Court will decide whether the state's disorderly conduct statute (reprinted, in pertinent part, below) can be construed to criminalize pure written speech that is not accompanied by disorderly actions.

Wisconsin Statutes Section 947.01:

"...Whoever ... engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance is guilty of [disorderly conduct]."

Here is the background of this case: Douglas D., who was 13 at the time this incident occurred, was given a creative writing assignment by his eighth grade English teacher, popularly known as Mrs. C. He was to start a story that would be passed on to other students to finish. The teacher gave the story a title—"Top Secret"—and neither assigned nor prohibited any particular topic. The assignment was to be completed during the class period. Instead of starting the assignment, Douglas talked with friends and, according to Mrs. C., disrupted the other students. She sent him into the hall to begin writing. At the end of class, Douglas handed in his assignment, which read as follows:

There one lived an old ugly woman her name was Mrs. C. that stood for crab. She was a mean old woman that would beat children senseless. I guess that's why she became a teacher.

Well one day she kick a student out of her class & he didn't like it. That student was named Dick.

The next morning Dick came to class & in his coat he consiled a machedy. When the teacher told him to shut up he whiped it out & cut her head off.

When the sub came 2 days later she needed a paperclipp so she opened the droor. Ahh she screamed as she found Mrs. C.'s head in the droor.

Upon reading this, Mrs. C. became upset and notified the assistant principal, who called Douglas to the office. The student apologized, saying that he had not intended any harm and that he had not meant the essay as a threat. He repeated this claim to an Oconto County juvenile court worker and also apologized to his teacher during a meeting in the principal's office.

A juvenile court delinquency petition was then filed, alleging that Douglas had "engaged in abusive conduct under circumstances in which the conduct tends to cause a disturbance" in violation of the disorderly conduct statute. After a court trial (a trial heard by just a judge – no jury) Douglas was found guilty of disorderly conduct. Specifically, the circuit court found that

the disorderly conduct statute applies to pure written speech and that Douglas's essay was not protected by the First Amendment¹. The judge stated:

Here there is absolutely no social value achieved by the juvenile's conduct in completing an assignment allegedly that makes a direct threat to his teacher. That is not the type of activity that is allowed either under the First Amendment or any other right that a student has in a classroom.... There is no question that this is a direct threat to the teacher. This is not the type of action that we're going to allow in our community. It's not the type of action that we're going to allow in our classrooms...."

Douglas was placed on formal supervision for one year, with physical placement in his mother's home with several conditions including a 9 p.m. curfew and a letter of apology to the teacher.

Douglas appealed, and the Court of Appeals affirmed the trial court. The appellate court held that the creative writing assignment constituted a "direct threat" against the teacher and thus was not protected by the First Amendment. The Court of Appeals pointed out that the right to free speech is not absolute, and that speech may be punished if it presents a "clear and present danger of a serious substantive evil," or if it constitutes a "true threat," which has been defined by the courts² as existing when "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."

In his appeal to the Supreme Court, Douglas argues that the disorderly conduct statute is not meant to criminalize speech unless that speech is intertwined with actions that are disorderly and likely to cause a disturbance. He argues that his only action was putting a pen to paper.

The State, on the other hand, argues that Douglas was not prosecuted for merely writing an essay, but for giving that essay to the targeted teacher knowing she would read it. Had he written the essay but not given it to the teacher, the State argues, Douglas never would have faced charges.

The Supreme Court will decide whether pure written speech can be prosecuted under the disorderly conduct statute.

¹ U.S. Constitution, First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

² Watts v. United States, 394 U.S. 705 (1969) and United States v. Orozco-Santillan, 903 F.2d 1262 (9th Cir. 1990)